DANIEL T BERKLEY
DBERKLEY@GORDONREES.COM
DIRECT DIAL: (415) 875-4155

GORDON & REES LLP

ATTORNEYS AT LAW
EMBARCADERO CENTER WEST
275 BATTERY STREET, SUITE 2000
SAN FRANCISCO, CA 94111
PHONE: (415) 986-5900
FAX: (415) 986-8054
WWW.GORDONREES.COM

September 23, 2009

VIA E-FILING

National Labor Relations Board
Lester A. Heltzer, Executive Secretary
1099 14th St. N.W.
Washington, D.C. 20570-0001

Re: CORRECTIONS / ERRATA to Respondent's Answering Brief To General Counsel's And The Union's Briefs In Support Of Exceptions To The Supplemental Decision Of The Administrative Law Judge
Case No. 20-CA-33367, et al. Stevens Creek Chrysler Jeep Dodge, Inc.

Dear Secretary Heltzer:

Respondent has inadvertently made some minor errors in its Answering Brief filed earlier today. We have made those minor changes in the attached Answering Brief; there have been no major changes to the text or Respondent's arguments.

The attached Answering Brief is being re-filed in its entirety rather than filing an errata sheet for ease in reviewing. Please discard the Answering brief filed at approximately 2:31 p.m. (EST) today.

This corrected brief is being re-served on all parties, as noted in the attached certificate of service. This Corrected filing and service is within the time period for filing and service pursuant to the Board's rules.

Thank you in advance for accepting this Corrected Answering Brief. Please contact me if there are any questions.

Respectfully submitted,

GORDON & REES LLP

Daniel T Berkley

cc: David Reeves, General Counsel David.Reeves@nlrb.gov
Caren P. Sencer, Esq csencer@unioncounsel.net
Joseph Norelli. Regional Director Joseph.Norelli@nlrb.gov

SCCJD/1045370/7069820v.1

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

STEVENS CREEK CHRYSLER JEEP DODGE, INC. Respondent	Cases:	20-CA-33367 20-CA-33562 20-CA-33655

and

MACHINISTS DISTRICT LODGE 190, MACHINISTS AUTOMOTIVE LOCAL 1101, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
Charging Party

RESPONDENT STEVENS CREEK CHRYSLER JEEP DODGE INC.'S ANSWERING BRIEF[1] TO GENERAL COUNSEL'S AND THE UNION'S BRIEFS IN SUPPORT OF EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

[1] This is a corrected Answering Brief; minor errors were corrected; no major changes were made to the Answering brief e-filed with the Board on 9-23-09 at approximately 2:31 p.m. (EST). This corrected Answering Brief is also being served on all parties via e-mail service.

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I. INTRODUCTION

The National Labor Relations Board (hereinafter "Board") in *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB No. 132 (2009), directed the Administrative Law Judge ("ALJ") Jay Pollack to reconsider three 8(a)(1) allegations, the 8(a)(3) allegation that Respondent unlawfully discharged service technician Patrick Rocha Sr., ("Rocha"), the propriety of a *Gissel* bargaining order, and two derivative 8(a)(5) allegations that are wholly dependent upon the issuance of that bargaining order.[2] On remand, the ALJ found that Stevens Creek Chrysler Jeep Dodge ("Respondent") violated Section 8(a)(1) by questioning service technician Patrick Rocha ("Rocha") about his union membership, and by unlawfully threatening service technician Baybayan that his wage rate would be reduced. The ALJ found, once again, that Respondent did not threaten employees with plant closure at a May 11 company meeting, nor did Respondent unlawfully discharge Rocha in violation of Section 8(a)(3). The ALJ also found that the Gissel bargaining order was unnecessary. Consequently, the ALJ rejected General Counsel's assertion that Respondent committed two derivative 8(a)(5) violations. (See SALJD 1-3) General Counsel excepts to the ALJ's failure to find the 8(a)(3) discharge, to his failure to recommend a Gissel bargaining order, and to his failure to find

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[2] The ALJ's Supplemental Decision will be referred to as SALJD, transcripts will be cited to as Tr, General Counsel's Exhibits will be cited to as GC, Respondent's Exhibits will be cited to as R.

In the underlying decision, the Board found that Respondent coercively interrogated employees, created the impression of surveillance, unlawfully required employees to execute withdrawal cards, threatened plant closure, threatened not to hire a job applicant because of his union activities, and granted wage increases to discourage union activity. (See SALJD 1:30-35).

derivative 8(a)(5) violations.[3] The Union in turn excepts to the ALJ's failure to order Zaheri to read the Notice to Respondent's unit employees.

To borrow from Shakespeare's Macbeth, the story counsel for the General Counsel ("General Counsel") spins in an effort to persuade the Board to find these violations is a " walking shadow... that struts and frets [its] hour upon the stage ... that is full of sound and fury, signifying nothing." *Macbeth Act 5, scene 5, 19–28.* General Counsel's arguments are speculative; he dismisses/rejects compelling evidence, and he peppers his brief with his own personal opinions as to what a manager/employer in an industry he does not work would or should do in a number of different circumstances. The General Counsel diverts the Board's attention from the ultimate truth in this case, which is that Rocha was discharged because of serious attendance and productivity issues having nothing to do with Rocha's purported Union activity. Presumably, General Counsel does so because he knows that the Union will have little chance of securing a bargaining order absent the finding of an 8(a)(3) violation.

Contrary to the General Counsel's assertions, Respondent was busy between January and March of 2007. (Tr. 852, 855:17-20, 893:8-11, 904:3-4) Even General Counsel's witness Rick Avelar, a union adherent, admitted Respondent had sufficient

[3] The General Counsel in his conclusion urged the Board to find that Respondent unlawfully discharged Rocha and refused to hire Mark Higgins in violation of Section 8(a)(1). Respondent assumes General Counsel erred in urging that the Respondent violated 8(a)(1) in both respects as General Counsel alleged that Respondent violated Section 8(a)(3) in its complaint with respect to both allegations. In any event, Respondent contends that the Board cannot find Respondent violated 8(a)(1) by refusing to hire Higgins as the Board found Respondent did not violate Section 8(3) with respect to its refusal to hire Higgins and the Board did not remand the issue to the ALJ for his consideration. Moreover because General Counsel failed to urge the Board to find an 8(a)(3) violation in its conclusions and failed to file a charge alleging an independent 8(a)(1) violation with respect to Rocha's discharge, this allegation should also be dismissed. Additionally, General Counsel's Exception 3 should be stricken as the Board did not remand the issue as to whether mechanic Gonzales was given a $1.50 wage raise to dissuade him from supporting the Union and General Counsel did not argue this in his brief in support of exceptions.

work to keep service technicians working forty hours a week during January and February (Tr. 432:8-18; 437:2-10; 423:15-21; 425:5-11). Avelar himself worked eight hour days and he never left early for lack of work (Tr. 432:8-18; 437:2-10). Documentary evidence supports this as everyone of Respondent's technicians, other than Rocha, worked approximately 40 hours a week (R-31). Rocha arrived at work late, took long lunches and left work early and, as a consequence, Rocha worked just 177 hours in the six weeks preceding his discharge or 29.5 hours per week.[4] Not only did Rocha have serious attendance issues, but Rocha took too long to and incorrectly diagnosed problems needing repair (SALJD 2: 24-25, 38-39; Tr. 853:15-854:11; 903:16-904:22, 965-966:16, GC-16). As a consequence, Rocha earned significantly less money for Respondent than all but one technician, an apprentice who was still learning the business and put significantly greater effort into his job (R-31). Respondent's managers talked to Rocha about this on several occasions, but Rocha did not improve or make any effort to do so (SALJD 2:24-25, 35-39; 851:17-857:5, 967:19-970:10). On February 26, Rocha was issued a final warning, but instead of improving, Rocha left work early that very day and showed up late to work the following morning (R-12; 856:17-857:5; 970:5-15).

On February 27, Respondent decided to terminate Rocha as it was clear Rocha would not improve (970:8-17). Consistent with industry practice, Respondent decided to wait until the end of the pay period (Friday March 2) to discharge Rocha (Tr. 857:6-13;

[4] In the six weeks between January 22 and March 2, 2007 (30 working days), Rocha left work early 29 days, worked less than a six hour day eleven days, took more than an hour for lunch on nine days and more than a two hour lunch on four days (SALJD 2,40-45). Surely no employer would tolerate such serious attendance issues. This does not include those occasions when Rocha was late for work. Not only does it limit the employee and the employer's productivity but it sets a bad example for other employees with the potential to cripple productivity and negatively effect employees respect for authority.

870:20-24), but events --- including the arrival of a Chrysler representative on the morning of March 2 --- prevented Respondent from discharging Rocha until the morning of March 6 two work days after Respondent became aware of union activity at the facility (970:25-971:23, 974:6-22).

As found by the ALJ, Respondent would have discharged Rocha irrespective of any perceived organizing activity on Rocha's part as the Respondent is a "for profit" business and Rocha's refusal to make himself available for work and failure to timely diagnose problems prevented Respondent from earning all that it otherwise should have had he worked a 40-hour week. As a "for profit" business Respondent seeks to maximize its earning potential and a lazy employee simply is not tolerated. This is particularly true in a small business like Respondent's where each employee's production represents a greater percentage of revenue. Respondent wanted Rocha to succeed, but Rocha was uncooperative and failed to produce. Respondent had no alternative but to discharge an unproductive employee who made no effort to increase his hours or production. Consequently, Respondent did not violate Section 8(a)(3) by discharging Rocha.[5]

II. THE ALJ'S CREDIBILITY FINDINGS

Contrary to General Counsel's characterization, there is no requirement that a ALJ's credibility resolutions be explicit for the Board to defer to the ALJ's credibility resolutions. *See St. Francis Medical Center*, 347 NLRB No. 35 slip. op. at 2 (2006) (wherein Board relied on ALJ's implicit crediting of one witness's testimony over that of another witness's conflicting testimony without explicitly crediting/discrediting either

[5] Carefully note, this is a Chrysler dealership.

witness, and without any explanation as to basis of credibility resolution). In the instant case, the ALJ explained that he made his credibility resolutions based on his review of the "entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses and the teachings of *NLRB v. Walton Manufacturing Company*, 369 US 404, 408 (1962)." The ALJ went on to state that as to witness testimony contradictory to his findings, those witnesses' testimony was disregarded either because the testimony was in conflict with credited documentary or testimonial evidence or because it was incredible or unworthy of belief (SALJD 1, fn. 1). The ALJ made clear that he evaluated all testimony and evidence and made credibility resolutions based on the above mentioned factors. Under *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951), the Board's established policy is not to overrule an administrative law ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect." The General Counsel simply cannot meet that burden.

General Counsel specifically excepts to many of the ALJ's findings of fact that are fully supported by the record and the ALJ's credibility determinations. Essentially, General Counsel argues that the ALJ's credibility determinations should be overruled because the ALJ did not explicitly deal with evidence that General Counsel argues contradicts the ALJ's credited facts and relied on testimony of Respondent's witnesses whom the ALJ had discredited in other instances. General Counsel asserts the ALJ's findings were based on the unsupported testimony of Garcia, Zaheri, Nickerson, and Frontella and that these witnesses' testimony should be discredited because the ALJ specifically discredited their testimony on a number of points. There is no requirement

that an ALJ or the Board discredit a witness simply because he has been discredited in another instance. As Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 794, 795 (2d 1950) "[i] t is no reason to refuse to accept all a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions that to believe some but not all." See *Bliss Clearing Niagara Inc.*, 344 NLRB No. 26 (2005); *Amber Foods Inc.*, 338 NLRB 712, 715 fn.13 (2001). Here there is ample and consistent testimony regarding Rocha's attendance and performance problems, Respondent's effort to counsel Rocha, Rocha's failure to improve, and Respondent's decision to terminate Rocha on February 27, 2007. Even if the Board chooses to take an independent evaluation of both the testimonial and documentary evidence, the Board will find that the preponderance of the relevant testimonial and documentary evidence support the ALJ's findings and conclusions. Thus, the Board should affirm the ALJ's findings and conclusions.

III. DISCHARGE OF PATRICK ROCHA

The ALJ correctly found that Respondent terminated Rocha on March 6, 2007 for attendance and productivity issues. (SALJD 2:2-25). General Counsel has excepted to the ALJ's findings and conclusions arguing that a thorough review of the documentary and testimonial evidence in this case will reveal that Respondent unlawfully discharged Rocha because of his perceived union activities in violation of 8(a)(3) and (1). *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir, 1981), cert. denied 455 U.S. 989 (1982). Specifically, General Counsel asserts the evidence demonstrates that Respondent condoned Rocha's early departures and long lunches until March 2, 2007 until Respondent learned its employees intended to organize the dealership. Respondent

thereafter terminated Rocha and attempted to cover up its unlawful actions with inconsistent and shifting explanations.

A. Garcia Counseled Rocha[6]

The ALJ in his supplemental decision on remand found that Garcia counseled Rocha on February 12, 19, and 26, 2007 about his attendance problems (SALJD 9:24-25). General Counsel contends the ALJ was in error because Rocha denied Garcia counseled him (Tr. 333-336). General Counsel also contends that the documentary evidence supports its contention that Respondent unlawfully discharged Rocha. The ALJ errs as the vast preponderance of all credible evidence supports the ALJ's finding.

1. Respondent's Witnesses Corroborate that Garcia Counseled Rocha.

Respondent's witnesses all corroborate that Rocha was counseled for performance and attendance problems. More specifically, Garcia said he first spoke to Rocha on February 12 after Frontella indicated Rocha was difficult to find during the day and that Rocha came in late, left early, and took long lunches. Nickerson advised Garcia to counsel and verbally warn Rocha (Tr. 963:19-964:3; 967: 8-13; 905:4-20; 853:10-20). Garcia testified that he informed Rocha that Rocha needed to come see him if he ran out of work, if it took longer than ½ hour to diagnose a problem, if he felt he was being undersold by a service advisor, and that they would meet weekly to chart Rocha's progress (Tr. 966:14-19). Garcia testified that he showed Frontella his counseling minutes and indicated he discussed Rocha's low hours and the five items listed in Garcia's counseling notes with Rocha (GC-16; Tr. 967:17-24). Frontella confirmed that he had a conversation with Garcia regarding Garcia's counseling of Rocha, that Garcia

[6] Section III deals with GC's Exceptions 4-37 and Union Exceptions 1-4.

showed Frontella his counseling minutes, and that Frontella was to let Garcia know how Rocha was progressing (Tr. 855:3-22). Garcia indicated he checked with Frontella later that week and that Rocha was still hard to find, left early and was taking long lunch hours (Tr. 968:1-10). Garcia stated he then met with Rocha on February 19, and that they discussed the same problems they previously discussed, including Rocha's leaving early and taking long lunches (Tr. 968:13-19). Garcia later spoke with Frontella about Rocha's continued poor performance and attendance issues (Tr. 968:20-969:10). Frontella testified he informed Garcia towards the end of the week that Rocha was still difficult to find in the afternoon either because Rocha had taken a long lunch or because Rocha left early (Tr. 855:25-856:11). Garcia talked with Rocha again on February 26 about the same issues. Garcia orally provided Rocha a final warning, stating that if Rocha was late again, left early or took a long lunch he would be terminated (Tr. 856:12-18; 863:3-14).

Contemporaneous documentary evidence also proves that Garcia counseled Rocha. Garcia's counseling minutes (GC-15), Respondent's letter to the California Employment Development Department (GC-31), and Respondent's separation report (GC-16) all conclusively establish that Rocha was counseled in February 2007 by Respondent about his attendance and performance problems.

2. The ALJ Properly Discredited Rocha's Claim That He Was Never Counseled.

Rocha's testimony that Respondent never counseled him should be discredited because Rocha is not a credible witness. First, Rocha acknowledged on cross examination that Nickerson spoke with Rocha after he arrived late on his first day of work and that Nickerson advised Rocha that he must come to work on time (Tr. 901:7-11). Rocha denied this was counseling. Rocha also admits Nickerson spoke to him about

walking off the job while he still had work during the first week, yet claims he was not counseled (Tr. 319:2-320:21). Apparently in Rocha's view there is no counseling unless an employer expressly labels it counseling and presumably entitles the document memorializing the counseling as counseling. Consequently, Rocha's claim that he was never counseled by Respondent is patently false and any statement by Rocha should be suspect.

Furthermore, there is significant other evidence supporting Respondent's claim that Rocha is not credible. Rocha was previously terminated from a technician position at Allison BMW because of a time card infraction which Allison BMW evidently concluded was fraudulent (Tr. 899). Rocha also distorted the truth when he initially testified that he was laid off from Stevens Creek Subaru rather than terminated for poor productivity (Tr. 897:21-898:1; 467:5-468:8; R-19 and 20). Furthermore, Rocha wrongly stated that he was hired "on the spot" by Chris Nickerson (Tr. 313:24-314:9). Nickerson testified that the decision to hire Rocha was not made until a couple of days later by Respondent's owner Mat Zaheri after Nickerson checked Rocha's references and that it was Zaheri that had the final decision to hire Rocha (Tr. 899-900). Zaheri and Service Manager Jim Garcia similarly testified that only Zaheri had the authority to hire employees (Tr. 1099:9-15; 1173:10-17). Moreover, it simply defies belief that Respondent never counseled Rocha given his attendance and performance issues. Consequently, it is unclear why Rocha's testimony that he was never counseled should be preferred to that of Respondent's witnesses (Tr. 467:5-16; 468:11-18; Tr. 758:7-75).

3. The Documentary Evidence Does Not Contradict the ALJ's Findings that Rocha Was Counseled

a. Excel Spreadsheet Documenting the Counseling---GC-16

Garcia's February counseling session with Rocha (GC-16), is a forgery and should be disregarded because Respondent declined to hire a computer expert to verify when the document was last modified. General Counsel then leaps to the conclusion that if that document is a forgery Respondent did not counsel Rocha. The Board should decline to so find. First, Respondent was not obligated to hire a computer expert to authenticate the date of the document's creation. Respondent asserts the document is authentic, and General Counsel presented no evidence to the contrary. Second, Respondent granted General Counsel unlimited access to Garcia's computer's hard drive, and rather than bring an expert with him, General Counsel took the opportunity to speak by phone with the NLRB Region's IT expert to verify when the spread sheet was last modified (Tr. 1184; 1038:23-1039:6). For obvious reasons, the General Counsel elected not to take further steps to verify or discredit the date in which the documents were created. They were obviously authentic. General Counsel should not be permitted to benefit from its failure to further pursue the of investigate the document's authenticity. It is Respondent's belief General Counsel did not want to learn the truth about the origins of the minutes or had learned the truth and not disclosed it as it would not support General Counsel's theory of the case.

Other than Rocha's denial that counseling sessions occurred, General Counsel failed to provide any evidence supporting the notion that the counseling minutes contained in GC-16 were not created on February 12, 19, or 26, respectively (Tr. 965:9-21; 967:3-7). Garcia conceded that the document in which the February 12, 19, and 26

counseling sessions were documented was initially created on January 22, 2007, well before any union activity (Tr. 1038:9-11). Consequently, the mere fact that the excel document was initially created prior to February 12, and was later modified, should not call into question either the legitimacy of the counseling minutes contained in the document or the dates upon which Garcia testified he created the counseling minutes.

General Counsel also argues that GC-16 is a forgery created after the filing of the unfair labor practice because Garcia did not place a formal written warning in Rocha's file as instructed by Nickerson, nor provided a reason acceptable to General Counsel for his failure to do so. While General Counsel is correct in stating that had the warning been in writing signed and dated by Rocha it would have provided additional proof that the counseling session occurred, the absence of such a document does not establish GC-16 is a forgery, particularly given Rocha's witnesses' uniform testimony and the separation report's clear statement that Rocha was counseled in February. More importantly, the fact that Nickerson directed Garcia to formally write up Rocha clearly shows that Rocha's attendance and performance was a serious issue for Respondent and not something that would be condoned. Finally, even if the Board chooses to find the document is not genuine, this does not mean the counseling session never occurred, only that the document was not created at the time Garcia claimed it was.

b. Separation Report---GC-15

General Counsel further contends that none of the counseling sessions occurred because Rocha's separation report (GC-16) makes no mention of the February 12 counseling session. General Counsel contends this is significant because it was in this counseling session Garcia initially explained what he expected Rocha to do to improve

his attendance and productivity and because the instructions to the separation report ask the employer to fully explain the reasons for the employee's discharge.[7] Contrary to the General Counsel's assertion, Respondent's failure to list the February 12 counseling session in the separation report does not mean that Garcia did not counsel Rocha in February 2007. More to the point, the separation report, like Garcia's counseling notes, clearly and unambiguously states that Garcia counseled Rocha on February 19 and 26 about his attendance and production problems. Consequently, the separation report does not support General Counsel's contention that the Garcia never counseled Rocha.

General Counsel also argues that the February counseling sessions never occurred because (1) Garcia did not provide, in General Counsel's estimation, a satisfactory explanation for the omission of the February 12 counseling session in the separation report; (2) the separation report and the counseling report do not indicate Rocha was given a final warning on February 26; and (3) the counseling notes do not explicitly state that Garcia talked with Rocha on February 26. While it is true that the instructions to the separation report advises that Respondent should have fully explained the circumstances resulting in Rocha's discharge, Respondent's failure to list one of three counseling session and a final warning hardly suggests that Respondent did not counsel Rocha. This is particularly true, given the separation report specifically mention two counseling sessions on the exact date Rocha contends counseling did not occur and which is supported by minutes from those counseling sessions. Moreover, Garcia accurately

[7] If we are to accept General Counsel's theory that Respondent's inadvertent omission of one counseling session in the description of the basis of the discharge proves Respondent never counseled Rocha, then General Counsel must also agree that Rocha's failure to mention that he was discharged for his protected concerted activity in the section of the report giving Rocha an opportunity to comment on the reason for the discharge means Respondent did not discharge Rocha for his protected concerted activity and the allegations are a mere afterthought pretext.

explained in the separation report that Rocha was discharged for attendance and performance issues after he failed to improve following counseling. Garcia's failure to explicitly write that he met with Rocha on February 26, and that he gave Rocha a final warning was simply an oversight. Garcia is not a labor attorney and it is unreasonable to expect him to draft separation reports and counseling minutes as thoroughly and completely as an attorney might. Thus, the separation report and Garcia's counseling minutes confirms Respondent's witnesses' testimony that Garcia counseled Rocha for attendance and performance problems in February 2007.

Additionally, General Counsel notes that Garcia testified that the precipitating factor in Respondent's decision to discharge Rocha was his late arrival at work on February 27, but that late arrivals was not mentioned in either Garcia's counseling minutes, nor in Rocha's separation report and that Garcia never explained why neither document mentioned tardiness. General Counsel asserts Respondent's inability to provide a justification for this omission supports its contention that Garcia never counseled Rocha. General Counsel is reading too much into the omission. As mentioned previously, Garcia is not an attorney and should not be expected to document every reason for Rocha's discharge. More importantly, the separation report and counseling minutes are consistent with Respondent's contention it discharged Rocha for attendance and performance issues given that a late arrival like an early departure or long lunch shortens an employee's work day and prevents Rocha from generating Respondent as much income as Rocha otherwise might.

Further, General Counsel argues that Respondent must have intentionally withheld work from Rocha because Rocha complained that he was not receiving enough

work on a single occasion.[8] General Counsel apparently believes that it was Respondent's burden to make sure Rocha was always working and that Garcia should have requested Frontella keep Rocha busy if Respondent was legitimately concerned with Rocha's performance. This burden is misplaced and unreasonable. Rocha frequently did not complete repairs on the days he received vehicles. Further, both Nickerson and Frontella testified one of the problems they had with Rocha was that he frequently was not in the service bay and was hard to find when they looked for him to learn the status of repairs (Tr 851:20-853:5). Under these circumstances, it is simply inefficient and unreasonable to demand service writers or the dispatch office to search high and low for Rocha every time a new order came in to see if he needed work. In fact, the practice at Respondent was for technicians to go to the dispatch office and let dispatch know they needed work and the service technicians were aware of this (Tr. 867:2-11; 893:22-894:1). If Rocha truly wanted more work he should have gone to Respondent's management and asked for work. The evidence shows that Rocha only requested work from Respondent on two occasions: February 12 and March 2. Anyone interested in getting work would not behave so passively.

Moreover, Rocha's own time cards suggest Rocha did not want work. Rocha's time cards suggest Rocha did not want work. Under normal circumstances, employees punch in and on to a "time flag", then go to dispatch to request work. [TR 472:14-17

[8] General Counsel also argues Rocha did not take too long to do his work, but rather Respondent chose not to give him work. General Counsel reaches this conclusion based on a document it generated in a misguided attempt to measure Rocha's productivity vis a vis Respondent's other technicians (GC-26). However General Counsel's document does not accurately reflect the technicians productivity as Rocha's alleged productivity was measured by dividing Rocha's flat rate hours by his clock hours. Unfortunately, the other employees whom General Counsel measured Rocha's purported rates against were determined by dividing their flat rate hours by an assumed forty hour work week, not on the actual hours these employees worked. Hence, General Counsel has not established that Rocha's productivity was not one of the issues Respondent had with Rocha, nor has General Counsel established that Respondent intentionally withheld work from Rocha.

473:12-15 TR477:15]. The dispatcher gives the technician an RO, the technician performs the task, punches off that "time flag" and onto another for the next job from dispatch. This goes on until the work day has ended when the technician punches off the last job and out for the day. (TR 475:13) If Rocha had gone to dispatch and found that there was no work, he would have a blank or unapplied time flag where he had punched on to perform a task but there was no work. General Counsel makes note of only two times that he wrote "no work" and "waiting for work" [TR 499]. Rocha's own time card represent that he punched off a task and out early for the day with no unapplied flag. Clearly, Rocha was not interested in acquiring additional work. Nor has General Counsel explained why Respondent would have been interested in withholding work from Rocha. Certainly there was no evidence of any union activity at that time Rocha's work hours declined and common sense suggests that an employer would want to keep its employees fully employed to maximize revenue. Consequently, Rocha's testimony and General Counsel's arguments in this regard should be rejected. [9]

c. Zaheri Approved Rocha Discharge on February 27

Contrary to the General Counsel's contention, Zaheri approved Rocha's discharge on February 27. General Counsel notes that the ALJ found that the event that precipitated Rocha's discharge was his late arrival on February 27, but neither the separation report, Respondent's letter to EDD, nor Respondent's position statement

[9] Moreover it is curious Rocha complained about not receiving enough work on the same date that Garcia decided to counsel Rocha for attendance and performance issues and at no other time prior to March 2. The timing of Rocha's complaint suggests that Rocha was not really complaining about not receiving additional work but was simply trying to pass the blame for his attendance and performance. This is perfectly consistent with Rocha's practice at a previous employer where Rocha explained that he was railroaded by two foreman rather than truthfully respond that he was let go for a time card infraction (Tr.899:5-14). Moreover, common sense would suggest that had Rocha truly wanted additional work he would ask Frontella for this work as it is Frontella's responsibility to assign work, not Garcia's.

makes any mention of Rocha's late arrival on the February 27 (SALJD 2:24-25) General Counsel quotes language in the separation report which states that "Patrick's inability to get the work done correctly and on time" and "left early without permission did not advise anybody that he left" (GC-15). Respondent's letter to the EDD states that the "employee was counseled about poor performance and failed to improve his performance and he left early in defiance of employer's express directions not to do so" (GC-31). Further, Respondent's position statement states:

> "... February 19, 2007, Garcia talked with Rocha regarding the low level of flat rate hours and ongoing failure to work a full forty hours, and his going home early. One week later ... Rocha still took too long .... No correction of the problems was evident on March 6, 2007... . Accordingly, Rocha was terminated on March 6, 2007."(GC-34)

While it is true these documents do not explicitly refer to Respondent's late arrival on February 27, all three documents made clear Rocha had performance and attendance issues and that these issues resulted in Rocha's discharge.

General Counsel contends that the "early departure" referred to in each of these documents must refer to Rocha's early departure on March 2 and, consequently, Respondent's decision to discharge Rocha must have occurred after Respondent became aware of the union activity. Rocha testified that the only date he left work early without permission was on March 2 when Rocha claims Frontella asked him to stay a bit later and Rocha left without informing Frontella (Tr. 327:6-25). However, Frontella did not recall Rocha asking for permission to leave work early in March (Tr. 866:20-23), and Garcia indicated that part of Rocha's problem was that he did not request permission to leave early like other employees (Tr. 1082). Also documentary evidence shows Rocha left work early on February 27, 28, and March 1 (R-12). Thus, the preponderance of the

credited evidence shows that March 2 was not the only date Rocha may have left early without permission. Consequently, March 2 is not the only date to which this could refer.

The General Counsel also asserts the ALJ erred in finding that Respondent made the decision to Rocha on February 27, because Respondent did not present any documents specifically stating that the decisions to discharge Rocha was made on February 27 (SALJD 2:24-25). While this is true, it is also true that the documents presented by General Counsel do not establish that Respondent made the decision to discharge Rocha after March 2. Moreover, General Counsel has presented no testimonial evidence establishing that Respondent made the decision to discharge Rocha after March 2.

General Counsel errs in its contention that Respondent could have, and would have, terminated Rocha on March 2 if it had decided to discharge Rocha prior to the Union's March 2 meeting at Harry's Hoffbrau. General Counsel argues that Respondent's claim that Garcia could not discharge Rocha on March 2 was false because a Chrysler representative did not visit Respondent on the morning of March 2 and because the ruckus at the shop lasted just 30 minutes. General Counsel asserts, without any support, that had a Chrysler representative visited the dealership on March 2, Respondent would have received a letter from the representative documenting the meeting. Alternatively, General Counsel contends that Respondent would have had the representative testify at the hearing had the visit really occurred. General Counsel continues, no such visit occurred. Consequently, Garcia had time to prepare Rocha's termination papers if Respondent had in fact decided to terminate Rocha before March 2. Given that Rocha was not terminated on that date, General Counsel asserts Respondent must have decided to terminate Rocha after Respondent learned of the union activity.

General Counsel also argues that because the "ruckus" lasted just 30 minutes, this did not prevent Garcia from preparing Rocha's discharge papers and terminating Rocha that afternoon had Respondent already decided to discharge Rocha. First, General Counsel's assertion that the visit would have caused some written document to be generated is mere speculation. General Counsel presented no evidence that Chrysler routinely sends dealerships letters documenting its representatives' visits. Nor is it reasonable to expect Respondent to risk jeopardizing its business relationship with Chrysler by calling its representatives to testify at the hearing in this matter. As such, Respondent's failure to either produce the representative at the hearing or a document verifying the visit does not prove the visit did not occur. Nor does the fact that the ruckus in the shop lasted just 30 minutes mean that Garcia could have terminated Rocha that afternoon if the decision to discharge Rocha had already been made. While the ruckus itself might have lasted only 30 minutes Garcia still had to deal with the after effects of the meeting. Rather it was the combination of the Chrysler visit, the ruckus in the facility and Rocha's early departure that prevented Garcia from terminating Rocha on March 2.

Nor is there any merit in General Counsel's claim that Respondent's position statement (GC-34) and Zaheri's purported statement to the Region (GC-38) prove that the decision to discharge Rocha was made on March 5. Zaheri's alleged statement to the Region states: "Rocha's dismissal came about for a lack of hours worked and ... low hours produced through the months of January and February. ..." and "On the following Monday, 3/5 he did not come in or call and the decision to terminate him was made." Had Respondent intended to say Respondent decided to terminate Rocha on 3/5 because he did not come in or call, Respondent could have. Respondent did not. Thus, a more

plausible reading of this statement is: Respondent made a decision to terminate, and that Rocha also failed to show up for work on March 5. This reading makes particular sense in light of Zaheri's affidavit to the Region, and Zaheri's and Garcia's consistent testimony that Respondent made the decision to terminate Rocha on February 27. It is also consistent with the ALJ's finding that the Respondent added facts that occurred after Respondent's February 27 decision to terminate Rocha that Respondent believed would provide further support for the termination in the Region's investigation on Rocha's discharge.

Similarly, Respondent's counsel's position statement to the Region states, in relevant part:

> "... February 19, 2007, Garcia talked with Rocha regarding the low level of flat rate hours and ongoing failure to work a full forty hours, and his going home early. One week later ... Rocha still took too long .... No correction of the problems was evident on March 6, 2007... . Accordingly, Rocha was terminated on March 6, 2007."

The document only indicates that Rocha was terminated on March 6, which is perfectly accurate. It is silent as to when the actual decision to terminate was made. The fact that the letter states that there was no evidence the problem was corrected on March 6 shows only that Rocha had not corrected his attendance problem after Respondent decided to terminate Rocha.[10] This document is consistent with Garcia's testimony, the

[10] General Counsel also argues that Respondent must have reached its decision to terminate Rocha after March 2 because the separation report, the response to EDD and Respondent's counsel's position letter to the Region each indicate that Rocha was terminated in part because he left work early without permission. General Counsel contends, based on Rocha's uncorroborated and untrustworthy testimony, that the only date he left work early without permission was on March 2 when Rocha claims Frontella asked him to stay a bit later and Rocha left without informing Frontella (Tr. 327:6-25). However, Frontella did not recall Rocha asking for permission to leave work early in March (Tr. 866:20-23) and Garcia indicated that part of Rocha's problem was that he did not request permission to leave early like other employees (Tr. 1082).

separation report and the statement to EDD regarding the fact that Rocha was terminated because of his attendance problems. Moreover, it is in keeping with the ALJ's determination that Respondent was simply providing the Region additional evidence that would support Rocha's discharge but not what actually caused Rocha's discharge.[11]

General Counsel contends that Rocha's separation notice (GC-15), Respondent's response to the California Employment Development Department (EDD) regarding Rocha's discharge (GC-31), Respondent's counsel's position letter dated May 22, 2007 (GC-34), and Zaheri's alleged statement to the Board (GC-38), all indicate that Respondent did not decide to terminate Rocha until after Respondent became aware of union activity at Respondent's dealership. General Counsel's contention is in error.

Rocha's separation report is silent as to when the decision to discharge Rocha was made. The report states: "on 19th February we had [Rocha and Garcia] discussion on Patrick's [Rocha's] ability to do work correctly and make time. On 26th of February we discussed this again. Still no improvement - left early without permission did not advise anybody that he left." Moreover, the document is consistent with Garcia's testimony that Rocha was counseled on February 19 and 26 regarding his attendance problems, that Rocha did not heed his February 26 final warning and was shortly thereafter terminated. The consistency of this document with Garcia's testimony supports Respondent's contention that Respondent decided to terminate Rocha on February 27.

Similarly, Respondent's response to the EDD is silent as to when the decision to terminate Rocha was made. Respondent's response states "the employee was counseled

[11] In fact, the Region at one point found that the Union's allegation that Respondent's discharge of Rocha was unlawful lacked merit, and the Region dismissed the charge. The Union then re-filed the charge alleging the same facts, but this time the Region issued the complaint and has doggedly pursued the meritless claim.

about poor performance and failed to improve his performance and he left early in defiance of employer's express provision that he not do so." Thus, the document is consistent with the separation report and Garcia's testimony that Rocha was discharged because of his attendance problems.

Respondent's counsel's position statement to the Region is also silent as to the date the decision to discharge Rocha was made. Accordingly, Rocha was terminated on March 6, 2007." The document only indicates that Rocha was terminated on March 6, which is perfectly accurate. The fact that the letter states that there was no evidence the problem was corrected on March 6 shows only that Rocha had not corrected his attendance problem after Respondent decided to terminate Rocha. Further, this document is consistent with Garcia's testimony, the separation report and the statement to EDD regarding the fact that Rocha was terminated because of his attendance problems.

Further, Zaheri's alleged statement to the Region does not support the General Counsel's position that the decision to discharge Rocha was made on March 5. Rather, the document states: "Rocha's dismissal came about for a lack of hours worked and ... low hours produced through the months of January and February. ..." and "On the following Monday, 3/5 he did not come in or call and the decision to terminate him was made." Had Respondent intended to say Respondent decided to terminate Rocha on 3/5 because he did not come in or call, it could have. Respondent did not. Thus, a more plausible reading of this statement is: Respondent made a decision to terminate Rocha sometime prior to March 5, and on March 5 Rocha did not show up for work. This reading makes particular sense in light of Zaheri's affidavit to the Region and Zaheri's

and Garcia's consistent testimony that Respondent made the decision to terminate Rocha on February 27.

Finally, General Counsel assertion that Respondent's decision to discharge must have been made on March 5 because had Respondent intended to discharge Rocha prior to March 2 he would have had the separation report and papers printed by the morning of March 2 as Garcia did on March 5. General Counsel contends that Garcia's assertion that he was simply procrastinating and that is why Garcia did not have the separation report completed earlier is false. However, General Counsel's belief is based on mere speculation and disbelief that Garcia might procrastinate about performing that unpleasant assignment off for later in the day. Garcia's answer was reasonable under the circumstances. Garcia did not have the privilege of hindsight and consequently was unaware that events would interfere with his plan to discharge Rocha on March 2. The Board should disregard General Counsel's personal views as to the procedure Respondent should have utilized in counseling and discharging Rocha.[12]

B. Frontella Counseling Rocha

General Counsel excepted to the ALJ's finding that Frontella counseled Rocha about his late arrivals, long lunches and early departures. General Counsel notes that Rocha specifically denied being counseled by anyone at Respondent, and that Respondent furnished no documentary evidence supporting this contention (Tr. 333-36). Contrary to General Counsel's assertion, the record evidence supports the ALJ's

[12] Additional evidence of the baseless speculation by the General Counsel that Respondent did not act as it has testified, is the General Counsel's peculiar obsession that Respondent must state in all documents the precise date it decided to terminate Rocha. Had Respondent really decided to construct an elaborate pretext, it would have most certainly created a detailed self-serving "paper trail" and put it in place before it acted. In fact, this true and complete version presented by Respondent is supported by common sense, logic and actual business practice.

conclusion that Frontella counseled Rocha in January 2007 about being late, taking long lunches and about leaving early, and that Frontella spoke with Garcia about Rocha's attendance and performance issues (Tr. 852-857).

Additionally, common sense strongly supports a finding that Frontella discussed or counseled Rocha regarding his attendance problems. Rocha missed 62 hours of work in a six week period (177.15 out of 240 hours (6 weeks x 40 hour/wk)); as a result Rocha averaged only 29.5 hours work each week including 10 hours of training (R-31; 1187:18-22). As Rocha's immediate supervisor and the individual charged with assigning service technicians work, Frontella surely would have discussed Rocha's regular absences from his position. This further supports Frontella's testimony that he was concerned with Rocha's attendance and makes more credible Frontella's claim to have independently discussed the matter with Rocha.

General Counsel contends that because Respondent permitted employees to leave work early if they had no work and received permission from management, Respondent and Frontella would not have counseled Rocha for leaving work early when he had no work. While Respondent concedes employees, on occasion were permitted to leave work early with permission, Respondent did not grant Rocha permission to leave work early except on a few discrete occasions (Tr.1068). Given that Rocha testified he only left work early without permission on one occasion, it must be General Counsel's contention that Rocha went to Frontella 28 times in the 30 days preceding his discharge and requested and received permission to leave early (Tr. 301). Common sense suggests that this did not happen. Additionally, Garcia testified that Rocha neither requested nor received permission to leave work early (Tr. 1082). Further, the employees Respondent

granted permission to leave work early all averaged at a minimum close to 40-hours a week of work, unlike Rocha (R-31).

C. Rocha's Early Departures Did Cost Respondent Money

General Counsel contends that the ALJ erred in finding that Rocha cost Respondent money by clocking out early suggesting the evidence suggests otherwise. General Counsel claims that its evidence shows that Respondent was not busy during the months of January and February and because of this Respondent let its employees come and go as they please during this period.[13] General Counsel is in error.

Nickerson testified that he had 50-70 cars come into the shop every day and that Respondent would not have time to look at 10-20 of the cars (Tr. 911:3-11). Similarly, Frontella testified that he almost always had work available for technicians (Tr. 865:11-24). Thus, the evidence suggests work was available for Rocha had he requested it from Frontella. Rocha chose not to do so. Given the work was available, Rocha's failure to work the full day limited the revenues Respondent could earn in each day and thereby cost Respondent money.[14]

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[13] General Counsel argues Respondent was not busy in January and February 2007. General Counsel relies on Rocha's testimony that he was not busy in January and February (Tr. 1018) and GC-25, which shows the total labor hours Respondent's technicians worked by month. GC-25 shows Respondent's technicians worked 1,751.49 hours in January and 1926.72 hours in February. However, General Counsel failed to show that those raw labor hours would not provide Respondent's technicians 40 hours of work each week. Thus, General Counsel failed to provide support for its assertion that Respondent was not busy in January and February.

[14] Rocha worked only 177.15 hrs, including training and billed 153 hrs for the six week period preceding his discharge. Blanco worked 229.7 hrs and billed 284 hrs; Massey worked 238.5 hrs and billed 279 hrs; Wells worked 246.5 hrs and billed 220 hrs; Adamson worked 248.3 hrs and billed 260 hrs; Gonzales worked 251.5 hrs and billed 250 hrs; Lane worked 252.7 hrs and billed 201hrs; Seefeld worked 253.5 hrs and billed 232 hrs, Gonzales worked 254.8 hrs and billed 222 hrs; and Avelar worked 288.4 hrs and billed 292 hrs. Only Bumagat, an apprentice, billed fewer hours (145) than Rocha, an experienced technician. And Bumagat worked significantly longer hours (241.2), demonstrating he was trying to improve, unlike Rocha who made no effort to improve even after being informed his attendance was deficient (R-31).

General Counsel's explanation as to why Rocha repeatedly left work early also defies logic. If Rocha really wanted additional work he would have regularly gone to Frontella, Garcia, and Nickerson and asked for work. Rocha did not do this. Instead, he testified that he complained to Garcia on one occasion about having insufficient work (Tr. 335-336). Moreover, an employee really interested in working would make himself available by working a full shift and not being difficult to find during the day. If Rocha had done so, Rocha could have received additional work.[15] Rocha did none of those things. Finally, Rocha's fear of being laid off for low productivity makes no sense given that Respondent's primary concern is the amount of revenue Rocha is producing. Productivity is of secondary concern and relevant only to the extent Rocha worked an entire work day. Rocha never did.

1. Respondent Did Not Permit Other Full-Time Employees to Unilaterally Elect to Work a Part-Time Schedule

Contrary to the General Counsel's contention Respondent did not permit employees to do what Rocha did and work whatever hours he liked. As stated above, Rocha routinely left work early, took long lunch breaks and at times arrived late for work. On some occasions he did more than one. Concededly, Garcia granted Jim Massey an alternative arrangement whereby Massey had some flexibility as to the days and hours he worked. However, this was with the understanding that Massey would work close to a forty hour a week shift (Tr. 1116-1117). Garcia stated that he granted Massey the concession because Massey had a three hour commute to and from home (Tr. 1080-1081). General Counsel presented no evidence that Massey's work arrangement resulted in Massey regularly working less than 40 hours a week. In fact R-31 showed

[15] Frontella testified he could almost always provide someone with work if they requested it.

Massey worked 238.5 hours (including 6 hours of training) out of the 240 hours he was scheduled to work from January 22 through March 2, compared with Rocha's 177.15 hours (10 hours training). General Counsel also notes that Respondent permitted Ron Adamson to take long lunches suggesting that this also demonstrates Respondent permitted employees to work fewer hours. It does not. R-31 shows Adamson worked 248.3 hours (37 hours training) in that same time period. Further, General Counsel never demonstrated Rocha requested that Respondent grant Rocha a concession. Thus, Rocha's situation differed from Massey's and Adamson's not only in that Rocha worked just 29.5 hours a week, but also in that Rocha reduced his work hours without receiving prior approval from management. [16]

General Counsel also asserts that because Respondent permitted the other technicians to leave work early Respondent could not have been busy. This is simply not the case. While General Counsel is correct in his assertion that Respondent permitted its other technicians to leave work early, these employees only took leave on occasion and the reason for the early departures was not necessarily lack of work. Respondent permitted Lane to leave work early on two occasions in February, including once for training, and Blanco, Gonzales and Baybayan left work early three times in February (Tr. 124, 134, 292, 634; GC Brief 17-18; GC-27). None of these employees worked substantially less than a 40 hour week like Rocha (R-31). Hence, Respondent's leave

[16] General Counsel notes that Massey and Adamson did not sign authorization cards thereby implying that the Respondent engaged in disparate treatment by claiming Rocha was not permitted to leave work early, come in late or take long lunch hours whenever he liked because Respondent permitted two employees who failed to sign authorization cards to work an alternative schedule or to take an occasional long lunch. This fails because Respondent permitted other employees, including union ringleader Lane, to attend training, and to leave work early if they had no work. The key is that all these employees received permission to do so, none abused the privilege, and all these employees worked close to or in excess of 40 hours per week (R-31).

policy does not suggest that Respondent was not busy or that Respondent's employees had substantially less than 40 hours a week of work available.[17] Additionally, these employees' early departures from work stand in stark contrast to Rocha's. Rocha left work early every day but one that he worked in the six weeks preceding his discharge, and this does not include his long lunches or occasional late arrival (R-12). Rocha's colleagues left work early on occasion and each of these employees averaged close to or above a 40 hour work week. Therefore, Rocha's attendance differed dramatically from his colleagues.

2. Rocha Left Work Early When Work Was Available or Would Be Available Had He Worked a Full Day

General Counsel argues that Rocha could not cost Respondent money because under a flat rate system employees are paid only for work orders they complete. General Counsel contends that Rocha's early departure did not cost Respondent money because Respondent's operational costs are fixed, payroll taxes are directly related to income and the record indicates the only other benefit employees receive is a 401(k). General Counsel then cites to Rocha's personal ledger which purportedly details repair orders Rocha worked on from February 6 to his discharge.[18] General Counsel asserts that the ledger shows only two repair orders that arguably support Respondent's claim that Rocha left early with work to do: RO51558 on February 6 where the repair order could not be

[17] Additionally some of these employees left work early for training and not because of lack of work (R-31).

[18] The ledger should not be considered as Rocha can present no evidence verifying that it was a contemporaneously compared document. The mere fact that the ledger purportedly records repair orders beginning on February 6 suggests that Rocha's purpose in creating the ledger is to protect his interests in the event of discipline or discharge. More importantly if the ledger was in fact first created by Rocha on February 6, it stands to reason that Rocha was aware of his attendance and performance deficiencies and sought to create a record to protect or defend himself in case of discharge. If that is the case, it strongly suggests that anti-union animus was not the motivating factor behind Rocha's discharge.

completed because Rocha was waiting on a battery, and (2) RO52156 on February 21 which General Counsel asserts was through no fault of Respondent's.

What General Counsel fails to see that Rocha's failure to work his entire shift meant Rocha was unable to complete additional repairs on vehicles that may have come in after Rocha went home for the day. General Counsel dismisses this argument by saying that Respondent was not busy because Rocha said so. This is simply not the case. Frontella and Nickerson both testified Respondent was busy. And Frontella indicated work came in throughout the day.

As the ALJ found, Rocha's failure to remain at the dealership until the end of his shift on February 6 prevented Rocha from completing the repairs on RO51558. General Counsel is correct in stating that the vehicle needed an out of stock battery to complete repairs on the vehicle, but Respondent ordered the battery from another local dealership by 3:30 P.M. and shortly thereafter picked up the battery (Tr. 1344:17-1345:20; 1350-1351; R-36; R-37). Had Rocha remained at the dealership until the end of his scheduled shift at 4:30 P.M, rather than leaving at 3:06 P.M., Rocha would have had the battery and been able to complete the repair (Tr. 910:17-24). This would have permitted the customer to have their car a day earlier and would have freed Rocha up for other repairs and increased earnings.

Similarly, there is no evidence that Rocha's delay in completing RO52156 was due to any factor other than his early departures. According to the uncontroverted testimony of Nickerson and R-23, Rocha received RO52156 on February 21. Rocha was unable to complete the repair that day because the transmission control module (TCM) had to be ordered. Respondent received the part on February 23, and installed the part

between 12:48 and 2 p.m. Rather than remaining at the shop to complete the remaining repairs, Rocha went home early at 3:06 (R-23; R-12). Rocha could have finished that repair that very day as R-23 indicates Rocha needed just 1 hour and 42 minutes to complete the remaining repairs. Rocha could have completed it on February 26, but instead Rocha spent just 48 minutes on the repair on February 26 while opting to take a 3.1 hour lunch. Thus Rocha caused Respondent to wait five additional days to receive a car that the customer should have been able to pick up on February 23 if Rocha had simply worked a full work day[19] (R-23; R-12).

Moreover, Rocha's early departures were at least partially responsible for Respondent incurring $475 in costs associated with a rental car Respondent provided a customer because Rocha spent several partial days trying to diagnose a problem on RO50799 (Tr. 915:25-917:23). General Counsel's assertion that this is a diagnostic problem and not an attendance issue misses the point. Although another service technician was ultimately needed to diagnose the problem, Rocha's attendance issues that week resulted in Rocha working on the car over a few days and therefore delayed Respondent's transferring the vehicle to another service technician who could have more timely completed the repair and thereby reduced Respondent's cost in providing the rental. Ultimately, Rocha's poor attendance cost Respondent money because his reduced work hours required him to spread repairs over a greater number of days than was necessary, thereby preventing Rocha from taking on more work.

[19]General Counsel then makes the absurd argument that even if Rocha departed early on two occasions when he had work is true, the Board should still find that he remained at work if he had work. Rocha either left work early when he had work or he did not. Here we have at least two examples of him leaving work early when he had work or it would soon be available. There is no evidence suggesting that these were the only occasions. Consequently, this calls into question Rocha's veracity and it also supports Respondent's contention that Rocha's early departures concerned Respondent and resulted in Rocha's discharge.

3. Nickerson Credibly Testified Respondent Was Busy and that Rocha Cost Respondent Money

As mentioned above, it is perfectly reasonable for a judge to credit some testimony and discredit other testimony of a witness. Testimonial and documentary evidence support Nickerson's testimony that Respondent was busy in January and February 2007 and that Rocha's habit of leaving work early cost Respondent money. Nickerson testified that he had 50-70 cars come into the shop every day and that Respondent would not have time to look at 10-20 of the cars (Tr. 911:3-11). Similarly, Frontella testified that he almost always had work available for technicians (Tr. 865:11-24). Frontella informed Rocha that the Respondent was busy and that he needed Rocha to show up to work on time (Tr. 855:17-20). Even General Counsel's witness Avelar admitted Respondent had sufficient work to keep service technicians working forty hours a week during January and February (Tr. 433:13-18; 437:2-10; 423:15-21; 425:5-11). Avelar testified he worked eight hour days as did Lane (Tr. 437:2-10). Additionally Nickerson's testimony is supported by R-31(summary of hours worked and produced for six week period) which shows that all the technicians other than Rocha worked close to or above 40 hours a week and all but one apprentice technician produced a significantly greater number of flat hours. Thus, the evidence fully supports Respondent's claim that work was available for Rocha had he requested it. For whatever reason Rocha chose not to do so. Rocha's early departures cost Respondent money because it prevented him from completing repairs on open repair orders and prevented him from acquiring new ones.

4. Respondent's Justification for Rocha's Discharge Are Not Pretextual

Contrary to General Counsel's contention, Respondent's stated reasons for discharging Rocha have not shifted over time. All documentary and testimonial evidence provide the same rationale for Rocha's discharge: Rocha had attendance and performance issues which Rocha failed to correct. General Counsel chooses to ignore this and, instead, place the separation report, Zaheri statement, Respondent's position statement, and Respondent's letter to the California Employment Development Department ("EDD") under the microscope and point out instances where the documents differ and asserts any inconsistency confirm General Counsel's contention that the decision to discharge Rocha must have been made after Respondent became aware of union activity on March 2. However, General Counsel's analysis elevates form over function as each of those documents are consistent in stating that Rocha was discharged for attendance and performance issues.

A preponderance of the credible testimonial and documentary evidence shows that Respondent's witnesses Garcia, Frontella, Nickerson, and Zaheri credibly testified that Respondent was busy in January and February, that Rocha had an attendance and performance issue, that Respondent counseled Rocha for it, he failed to improve, on February 27 Garcia sought and received permission to discharge Rocha, and on March 6 Respondent discharged Rocha. Additionally, the documentary evidence cited above clearly supports Respondent's contention that all Respondent's employees other than Rocha worked approximately forty hours a week, that only Rocha routinely left work early, that Rocha was counseled in February because of Rocha's attendance and performance and that Respondent later discharged him for this. Thus, there is no

inconsistency in Respondent's rationale for discharge: Rocha was counseled for poor attendance and performance, failed to improve and Respondent discharged Rocha.

General Counsel on the other hand, relied almost entirely on untrustworthy testimony of Rocha and ignored common sense which suggests that no business would tolerate an employee coming and going as they please, particularly a new business trying to establish itself in a faltering economy. Additionally, General Counsel cites to minor inconsistencies Rocha's separation report, Zaheri's statement, Respondent's position statement, and Respondent's letter to EDD to argue that Respondent's defenses shifted over time, rather than focus on the fact that all of these documents clearly corroborate Respondent's witnesses testimony that Respondent discharged Rocha for attendance and performance issues and not Rocha's perceived union activity. As the ALJ found in his supplemental decision, Respondent's referral to dates after February 27 were made in response to an investigation by the Board and were merely misguided efforts to explain and justify Respondent's previous decision to justify Rocha's termination and not evidence of a shifting defense and pretext. Similarly, the mere fact the documents do not all utilize the same language or include in the document all the same events mean Respondent's justification to discharge Rocha has shifted or that its rationale is pretextual.

General Counsel spends considerable time arguing that Respondent's justification for Rocha's discharge should not be believed because Respondent did not include all the circumstances underlying Rocha's discharge and the date on which each event occurred in Rocha's separation report, Zaheri's statement, Respondent's position statement, and its letter to EDD. Moreover in General Counsel's view, each document should employ the

same language. General Counsel places form over the substance of the documents as all these documents support Respondent's assertion that Respondent counseled Rocha in February 2007, Rocha failed to improve, and Respondent discharged Rocha for time and attendance. The separation report notes that Respondent counseled Rocha on two occasions about Rocha's inability to get work done correctly and make time, that Rocha later left work early, and Respondent subsequently decided to terminate Rocha. While not utilizing the exact same language as Respondent did in the other documents, the document does indicate Rocha had performance issues and that Rocha did not work sufficient hours, that Respondent counseled Rocha for this and ultimately discharged Rocha for this. That Respondent failed to mention the February 12 counseling session in the final warning, and that Respondent made the decision to discharge Rocha on February 27, should not be fatal. While the language could be more consistent and more complete, this inconsistency and incompleteness of the document should not be attributed to any nefarious purpose but merely to the fact that Respondent's management are not attorneys and unaware of the need for consistency and thoroughness. Moreover, the demands of Respondent's business are such that Respondent did not have time to carefully craft the document. Consequently, the Board should not find the minor inconsistencies and minor detail variances of the documents as representing a shifting defense.

General Counsel also errs in its assertion that Respondent's position as to when the decision to discharge Rocha has shifted over time. The General Counsel notes that Respondent must have reached its decision to terminate Rocha after March 2 because the separation report, the response to EDD and Respondent's counsel's position letter to the Region each indicate that Rocha was terminated, in part, because he left work early

without permission. General Counsel contends based on Rocha's testimony that the only date he left work early without permission was on March 2 when Rocha claims Frontella asked him to stay a bit later and Rocha left without informing Frontella (Tr. 327:6-25). However, Frontella did not recall Rocha asking for permission to leave work early in March (Tr. 866:20-23) and Garcia indicated that part of Rocha's problem was that he did not request permission to leave early like other employees (Tr. 1082). Also documentary evidence shows Rocha left work early on February 27, 28 and March 1 (R-12). Thus, the preponderance of the credited evidence shows that March 2 was not the only date Rocha may have left early without permission. R-12 indicates Rocha left early on February 27 and March 1. Consequently, March 5 is not the only date to which this could refer.

General Counsel also errs in its assertion that Respondent disparately treated Rocha in light of Respondent's treatment of Massey, Adamson and other employees. As outlined above, Respondent did not treat Rocha differently than other employees. Respondent permitted Massey to work an irregular work week and Adamson to take long lunches but both employees averaged at or above a 40-hour work week. Massey worked 238.5 hours for the six weeks preceding Rocha's discharge and Adamson 248.3. Moreover, Massey produced over 279 flat hours and Adamson 260 flat hours. Rocha worked just177.5 hours and produced153 hours (R-31). Nor was any other employee permitted to work less than a 40 hour work week. Consequently, General Counsel's assertion that Respondent did not care if employees worked a full work week is without merit as is General Counsel's claim that Respondent was disparately treated.

In sum, Respondent has demonstrated by a preponderance of all relevant evidence that Rocha had attendance and performance issues that he failed to correct following

counseling. As a result Respondent made the decision to discharge Rocha on February 27, prior to any union activity. Certain unforeseen even precluded Respondent from discharging Rocha until March 6, 2007, two work days after Respondent became aware of union activity. The evidence further establishes that Rocha's performance was sufficiently serious that Respondent would have taken the same action absent any union activity.

IV. A REMEDIAL BARGAINING ORDER IS NOT APPROPRIATE [20]

General Counsel contends that the ALJ erred in failing to find a bargaining order was warranted in this case, because the chances of traditional remedies undoing the effects of Respondent's unfair labor practices were slight irrespective whether Respondent unlawfully discharged Rocha. General Counsel notes that Respondent unlawfully granted wage increases, threatened employees with plant closure and the loss of jobs, and that the Board has found the effects of these types of violations are not easily remedied or quickly forgotten. Moreover General Counsel asserts effects of Respondent's unfair labor practices are heightened because of the bargaining unit's small size and because all of Respondent's management participated in the violations. General Counsel thereafter cites a number of cases to support its position that a bargaining order is warranted:

Contrary to the General Counsel's assertion, the ALJ correctly found a bargaining order was not warranted in the instant case. First, the Union lost the support of a majority of Respondent's unit employees for reasons other than Respondent's alleged unfair labor

[20] This section relates to General Counsel's Exceptions 38, Union's Exception 5.

practices. The vast majority of the unfair labor practices the ALJ found and that General Counsel alleges occurred before the Union's May 16 filing of an election petition (even the unilateral wage increase occurred two days before the filing of the petition). (*Stevens Creek Chrysler Jeep Dodge*, 353 NLRB No. 132 (2009)). Clearly the Union felt it had sufficient support to win the election as of that date or it would not have filed the petition. Yet weeks later, the Union withdrew its election petition. Absent a loss of unit support, the Union would not have withdrawn recognition. Therefore, it is clear that the Union must have believed it had majority support after the most serious violations were committed. Consequently, the loss of majority support must be attributable to something other than Respondent's unfair labor practices. As such, no *Gissel* bargaining order is warranted because Respondent's unfair labor practices did not taint the election process.

Second, assuming the Board finds Respondent's unfair labor practices did taint the election process, Respondent contends that a remedial bargaining order is not warranted because the Board's traditional remedies are sufficient to erase the effects of Respondent's unfair labor practices *Id.* As the ALJ properly noted, a *Gissel* bargaining order is an extraordinary remedy, and the Board's preferred method is to hold an election after the unfair labor practices have been cleansed by the Board's traditional remedies. *Hialeah Hospital* 343 NLRB 391 (2004). In determining whether traditional remedies are adequate, the Board considers the number of employees directly affected by the violations, the size of the unit, extent of the dissemination among employees, and the identity and the position of the individuals creating the unfair labor practices. *Intermet Stevensville*, 350 NLRB No. 94 (2007).

In the instant case, the ALJ found that Respondent committed several 8(a)(1) violations including requiring employees to withdraw from union membership, threatening plant closure, wage decrease and job loss, interrogating employees, threatening not to hire an employee because of his union affiliation and unlawfully granting wage increases, but the ALJ did not find, and the evidence does not support a finding by the Board, that Respondent discriminatorily discharged any employee. (SALJD p. 4: 1-5). Respondent's two most egregious violations (the hallmark violations): the threat of job loss and plant closure was made to a single employee (ALJD 7:27-30) and the unilateral grant of wage increases was not conditioned on the unit or the employee's rejection of the Union. Moreover, the ALJ did not find and General Counsel failed to present evidence that the violations, particularly the three alleged hallmark violations, were disseminated throughout the unit.[21] Thus, the ALJ appropriately found no bargaining order was warranted.

Moreover, the ALJ appropriately cited in his initial and supplemental decisions a number of cases where the Board has found on similar facts that a bargaining order is not warranted. In *Burlington Times, Inc.*, 328 NLRB 750, 752 (1999) a case analogous to the instant case, the Board declined to issue a bargaining order where an employer threatened to close the plant, made non-economic grants of benefits, promised to improve wages and other benefits and solicited grievances in a unit of 11 employees. In *Hialeah Hospital*,

[21] The weakness in General Counsel's argument for a bargaining order is betrayed by the General Counsel's attempt to portray less serious 8(a)(1) violations as hallmark violations. General Counsel does so because he knows that the unfair labor practices found by the Board and by the ALJ are insufficient to justify a Gissel bargaining order. Specifically, and without any case support for its proposition, General Counsel argues that Respondent's informing prospective employees that they would need obtain a union withdrawal card from the union prior to beginning work constitutes a hallmark violation. This simply is not the same as threatening employees with plant closure or job loss for support of the union or unilaterally increasing wages in a quid pro quo for voting against a union such that the violation would likely have a lasting effect.

343 NLRB 391 (2004), the Board declined to impose a bargaining order against an employer that unlawfully surveilled a unit employee, subsequently discharged that employee in retaliation for his union activities, and committed a number of 8(a)(1) violations that directly affected the entire unit, including creating the impression of surveillance, threats of discharge, futility and unspecified reprisals, promises of benefits and the removal of benefits in a unit of 12 employees. In *Dessert Aggregates*, 340 NLRB 289, 294-295 (2002), the Board declined to impose a bargaining order in a unit of 11 employees where the employer discriminatorily laid off two union supporters and solicited and promised to remedy grievances.

The cases relied on by General Counsel in support of his contention that a bargaining order is warranted are distinguishable from the instant case because of the nature and/or quantity of the violations found. For instance, *Evergreen America Corp.*, 348 NLRB No. 12 (2007), involved a far greater number of serious unfair labor practices that were directed at a larger percentage of the unit. The Board found that over the course of a three-month period the employer in *Evergreen* engaged in three separate sets of hallmark violations, unlike the three instances of hallmark violations in the instant case. These hallmark violations included threatening employees with plant closure and job loss as well as unlawfully promoting employees, providing across the unit wage increases and making eight separate grants of other benefits to unit employees before and after the election, many of which were granted in response to the employer's unlawful solicitation of grievances. Additionally, the employer committed 13 separate instances of unlawful interrogation, 15 separate instances of implied promises to remedy solicited grievances, 8 instances of actual promises to remedy solicited grievances, 2 instances

employees instructed not to read union literature, and 1 instance of creating the impression of surveillance. Finally, *Evergreen* is distinguishable from the instant case because the employer in *Evergreen* continued to commit unfair labor practices even after the union lost the election. The Board found this clearly demonstrated the employer's continued propensity to violate the Act, and suggests that effects of the employer's unlawful conduct may linger. In the instant case, there has been no union election and nothing to suggest that Respondent would commit unfair labor practices following an election.

Big Horn Beverage Company, 236 NLRB 736, 754 (1978), is also distinguishable on the facts. First, the unit in that case included just four employees. Second, the employer unlawfully discharged one of the unit employees --- or one quarter of the unit. Third, that discharge was sufficient to eliminate the union's majority support. Finally, the employer interrogated every unit member. In the instant case, the Respondent committed no discriminatory discharges, let alone discharged a quarter of the unit. Nor did Respondent unlawfully interrogate the entire unit. As such, Respondent's actions were not as pervasive and would not have as lasting an impact on the bargaining unit.

Gerig's Dump Trucking, Inc., 320 NLRB 1017 (1996), is also distinguishable from the instant case. Although the employer in *Gerig* committed fewer unfair labor practices than Respondent committed in the instant case, the nature of the violations committed in *Gerig* are more serious and more likely to prevent a fair election from being conducted. In *Gerig's*, the employer explicitly conditioned the grant of increased benefits on the unit renouncing the union. Further exacerbating the lingering effect of that promise was the employer's grant of increased benefits upon the unit's renunciation

of the union. In the instant case, Respondent's wage increase was not dependent on the employee's renunciation of the union, but depended instead on the employee's performance evaluation. Finally, in *Gerig* the employer's threat of plant closure and job loss was more menacing than that in the instant case as the employer gave its employees 24 hours to return to work from their strike or the employer would close the plant and the employees would lose their jobs. In the instant case, the threat of plant closure and job loss was vague and the employees were under no deadline to make a decision.

Red Barn, 224 NLRB 1586 (1976), is also distinguishable from the instant case. In *Red Barn* the employer discriminatorily delayed rehiring a union ringleader until she agreed to renounce the union. Thereafter, the one-time union ringleader tape recorded union meetings for the employer, observed the election on behalf of the employer and shortly after the election was promoted to a managerial position. In addition, the employer threatened to withdraw benefits many unit employees depended upon, and the employer unlawfully granted the new health and life insurance benefits the employer learned employees wanted as a result of its unlawful interrogations. In the instant case, Respondent never discriminatorily delayed rehiring employees, threatened to withdraw benefits from employees or granted a benefit that Respondent uncovered through its unlawful interrogation.

Color-Tech Corporation, 286 NLRB 476, 476-477 (1987), is also distinguishable from the instant case. First, the unit in *Color-Tech* was comprised of only four employees. Thus, the effect of the employer's unfair labor practices would certainly be felt by all unit employees unlike the instant case where the unit is considerably larger. Second, the employer in *Color-Tech* unlawfully solicited and promised to remedy

grievances and promoted and supported an employee letter repudiating the union. Finally, the most significant difference between the two cases is that in *Color-Tech*, the employer explicitly conditioned the grant of wage increases on the employees' abandonment of the union. In the instant case, Respondent's wage increases were not conditioned on rejection of the union, but were instead based on a performance review that was accelerated because one unit member had a job offer and Respondent wished to retain him (Tr. 1025:3-1027:4).

Finally, *Cogburn Health Center*, 335 NLRB 1397 (2000), cited by the General Counsel is also distinguishable. In *Cogburn Health Center* the employer unlawfully discharged six employees and committed numerous other egregious 8(a)(1) violations including threats of plant closure, threat that unionization would result in a strike and subsequent job loss, informed employees that it would not bargain with the union, and threatened loss of current benefits to 30 unit employees. In the instant case, Respondent has not unlawfully discharged any employees and those 8(a)(1)s Respondent did commit were few, spread out over a few months and there was no evidence of dissemination.

Given that the Respondent has not discriminatorily discharged or refused to hire a union supporter and Respondent has only been found guilty of a few hallmark violations (threatening a single employee with plant closure and loss of job (ALJD 7:27-30) and granting benefits to service technicians which were not conditioned on the rejection of the union), the nature and quantity of the violations are not sufficient to justify the imposition of a bargaining order.[22]

[22] Even assuming the Board concludes that Respondent unlawfully discharged Rocha, a bargaining order is inappropriate unless General Counsel can show evidence that traditional remedies would only have a slight chance of undoing the effects of Respondent's unfair labor practices. Here, at worst, Respondent *(cont'd)*

V. DERIVATIVE 8(A)(5) VIOLATIONS[23]

Assuming a Gissel bargaining order is warranted, General Counsel argues the ALJ erred in finding that the Respondent did not violate Section 8(a)(5) of the Act by failing to furnish the union with requested information and by not bargaining with the union over the effects of the Respondent's subsequent decision to unilaterally eliminate the lube technician.

First, given the fact that no Gissel bargaining is warranted, the ALJ correctly found that the Respondent did not violate Section 8(a)(5) by failing to furnish the Union with requested information and by not bargaining with the Union over the effects of the Respondent's subsequent decision to unilaterally eliminate the lube technician.

A. Rother's Discharge

Assuming for the sake of argument that a bargaining order is indeed appropriate, Respondent, nonetheless, did not violate Section 8(a)(5) by discharging Rother. Rother's job differed from mechanics jobs as Rother's primary duties entailed parking cars, cleaning the shop, and performing oil changes (Tr. 960-962). In addition, Respondent permitted Rother to rotate tires in an effort to enhance his skills. Also, unlike service technicians, Rother was paid by the hour and not based on the work he actually

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(cont'd) committed a single 8(a)(3) violation with a number of other less significant violations spread out over a three month period well before the Union concluded it lost majority support. Rocha was discharged well before the Union even petitioned for a Board election. Thus, the unfair labor practices did not cause the Union to lose support of the bargaining unit. The instant case is distinguishable from *Dessert Aggregates*, above, wherein the employer discharged two active union supporters and solicited and promised to remedy grievances. The case is also distinguishable from *Redbarn*, above where the employer discharged and subsequently rehired the union ringleader on condition the ringleader renounce her union support, and the employer interrogated employees and granted the benefits those employees specifically indicated they wanted and threatened to remove health benefits. In the instant case Rocha was not vocal about his union support, nor was he a ringleader. Further, Respondent never conditioned receipt of benefits in exchange for the employees not supporting the union.

[23] This Section relates to General Counsel's Exceptions 39 and 40, Union's Exception 6.

performed. Thus, Rother's job differed substantially from the service technicians. Consequently, even if a remedial bargaining order is warranted, no 8(a)(5) should be found because Rother does not share a sufficient community of interests with service technicians to be included in the unit.

Even if there is a finding that Rother shared a sufficient community of interests with the service technicians so that Rother's position should be included in the unit (performed oil changes and tire rotations), no violation should be found because the elimination did not result in the loss of bargaining unit work (Tr. 960-962). In fact, it was Respondent's service technicians that in September 2007 initiated a conversation with Respondent in which they asked Respondent to perform their own oil changes and looked over the cars so as to increase the work Respondent's service technicians performed (Tr. 960-962). Respondent's unit employees absorbed the work Rother briefly performed. Thus, the elimination of Rother's position did not result in the loss of unit work and consequently no Section 8(a)(5) violation. *See Kohler* 292 NLRB No 70 (1989)(Employer violates Act by altering bargaining unit to exclude position from unit such that bargaining unit work is removed from unit violates 8(a)(5) absent notice and opportunity to bargain); *Geiger Ready-Mix*, 323 NLRB No.79 (1997). Moreover, this is not a elimination of a job classification but the termination of a single employee for lack of work. Compare *Wire Products Manufacturing Co.*, 328 NLRB No. 115 (1999)(Board found that the employer violated Section 8(a)(5) by the removal of job classifications from the unit which resulted in the loss of bargaining unit). That is not the case here. No work has been lost.

B. Refusal to Furnish Information

The Union requested, by an August 20, 2007 letter a list of employees, wage rates, dates of hire, classifications, personnel policies and fringe benefits. Respondent shortly thereafter denied the request saying it had no obligation to furnish information because the Union did not represent Respondent's employees. The Union filed a charge related to the failure to furnish information, but the Board dismissed the charge.

The ALJ correctly found that Respondent did not violate Section 8(a)(5) in any respect because Respondent had not committed unfair labor practices sufficiently pervasive, egregious, or lasting to justify the extreme remedy of providing a bargaining order. Thus, Respondent had no duty to furnish the union requested information.

Even assuming a Gissel bargaining order is warranted, Respondent's decision to terminate Steve Rother did not violate Section 8(a)(5) as Respondent did not remove bargaining work from the unit, nor does Respondent have a past practice of employing an employee in this job category. The work traditionally was performed by other technicians and the work has remained in the unit. Rother was the only lube technician, the position was newly created, and Rother performed many of the same jobs. In fact it was Respondent's service technicians that instigated Rother's termination because they wanted the additional work. Further Respondent only violates Section 8(a)(5) if the request concerns work or the terms and conditions of unit employees and relates to a mandatory subject of bargaining.

General Counsel is in error when it asserts that Respondent violated Section 8(a)(5) by not furnishing requested information. The Union never won an election nor did Respondent voluntarily recognize the Union. Even if a remedial bargaining order is

found appropriate, no 8(a)(5) violation should lie because at the time of the request, there was no bargaining relationship and so Respondent had no duty to furnish the information at the time. Respondent should not be held to have violated the Act by refusing to furnish information to a Union that was neither certified nor recognized as the bargaining representative of Respondent's employees at the time of the request. The Union had not won an election and Respondent had not voluntarily recognized the Union. Holding Respondent liable for failing to furnish this information would in effect require Respondent to anticipate the imposition of a bargaining order --- an extraordinary remedy that is not lightly to be imposed. Moreover, this is simply bad policy as it places employers on the horns of a dilemma. Either risk violating the Act by not providing this information or expend considerable resources disclosing confidential information to a union --- a third party --- that may never be selected employees' bargaining representative. Consequently no 8(a)(5) violation should lie for the failure to furnish information.

VI. READING OF NOTICE

The Union excepts to the ALJ's failure to require Respondent's owner Mat Zaheri to reading the Notice to Respondent's unit employees. The Board should decline to order this extraordinary remedy. The reading of the Notice is inappropriate in this case as there is no indication that the unit employees are illiterate nor did the Board find that Zaheri personally and repeatedly made the threats found violative of the Act. *See UFCW v. NLRB*, 852 F.2d (DC Cir 1988).

VII. CONCLUSION

It is respectfully submitted that the Board should affirm the ALJ's supplemental decision on remand and find that Respondent did not unlawfully discharge Patrick Rocha, that a Gissel bargaining order was not warranted, that no derivative 8(a)(5) violations lie, and that Zaheri need not read the Notice to the unit.

Date: September 23, 2009

Respectfully Submitted,

GORDON & REES LLP

____/s/_____
Daniel T. Berkley
Charles O. Zuver
Attorneys for Respondent Stevens Creek Chrysler Jeep Dodge Inc.

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CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon & Rees LLP 275 Battery Street, Suite 2000, San Francisco, CA 94111. On the date below, I served the within documents:

- RESPONDENT STEVENS CREEK CHRYSLER JEEP DODGE INC.'S ANSWERING BRIEF TO GENERAL COUNSEL'S AND THE UNION'S BRIEFS IN SUPPORT OF EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

☒ by transmitting via e-mail the document listed above to the e-mail addresses set forth below on this date before 5:00 p.m. (PST), pursuant to §102.114 (a, i) of the Rules and Regulations of the NLRB

David Reeves, General Counsel
National Labor Relations Board, Region 20
901 Market St.
Suite 400
San Francisco, CA 94103-1735
Phone: (415) 356-5130
Fax: (415) 356-5156
David.Reeves@nlrb.gov

Joseph Norelli. Regional Director
National Labor Relations Board, Region 20
901 Market St. Suite 400
San Francisco, CA 94103-1735
Phone: (415) 356-5130
Fax: (415) 356-5156
Joseph.Norelli@nlrb.gov

Caren P. Sencer, Esq.
Weinberg Roger & Rosenfeld
1001 Marina Village Pkwy.
Suite 200
Alameda, CA 94501-1091
Phone: 510-337-7306 Ext. 106
Fax: 510-337-1023

csencer@unioncounsel.net

The undersigned hereby further certifies that the above document was duly served upon the Office of the Executive Secretary of the NLRB in Washington D.C. pursuant to § 102.114 by transmitting via electronic filing the document listed above on this date before 11:59 p.m., EST.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 23, 2009 at San Francisco, California.

Molly Zahner